

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CHARLES JOSEPH GILYARD	:	
	:	
Petitioner,	:	CIVIL ACTION
	:	
v.	:	
	:	
	:	No. 06-2144
FRANK TENNIS, et al.	:	
	:	
Respondents.	:	

MEMORANDUM

Presently pending is the Report and Recommendation (hereinafter “the Report”) of United States Magistrate Judge Peter B. Scuderi and Petitioner’s Objections thereto. Petitioner objects to the Magistrate’s conclusion that the petition for writ of habeas corpus relief was untimely filed and must be dismissed. Specifically, Petitioner argues in his objection that the one (1) year statute of limitations should be equitably tolled on the basis of “extraordinary circumstances” based on his actual innocence. Petitioner also argues that the filing of a second state collateral review in 2003 tolled the statute of limitations. Because of the reasons stated below, Petitioner’s Objections will be overruled and the Report will be approved and adopted.

Factual and Procedural Background

The factual and procedural history are not in dispute in this case. Therefore, the Court will incorporate by reference the Procedural History portion of the Report and only reiterate the facts relied upon for this Court’s determination. Petitioner was convicted of first degree murder, robbery and conspiracy in February 1984. Petitioner was sentenced to life imprisonment. He appealed his judgment of sentence, and the Pennsylvania Superior Court affirmed judgment on May 30, 1985. Petitioner filed his first application for collateral relief pursuant to Pennsylvania’s

Post Conviction Relief Act (hereinafter “PCRA”) on June 25, 1987. In January 1992, while his PCRA petition was pending, Petitioner filed his first federal habeas corpus petition. Petitioner’s first habeas corpus petition was dismissed for failure to exhaust state court remedies in May 1992. In July 1997, Petitioner’s first PCRA petition was denied. Petitioner appealed to the Pennsylvania Superior Court, which affirmed the denial of his PCRA petition in December 1993. Petitioner’s petition for allowance of appeal with the Pennsylvania Supreme Court was denied on July 1, 1994.

In February 2003, Petitioner filed a second PCRA petition. His second PCRA petition was dismissed as untimely in May 2003. Petitioner filed the instant federal habeas corpus petition in May 2006.

Discussion

The Anti-Terrorism and Effective Death Penalty Act (hereinafter “AEDPA”) became effective on April 24, 1996. It amended habeas corpus law by imposing a one (1) year statute of limitations to applications for writ of habeas corpus filed by persons in state custody. 28 U.S.C. §2244(d)(1). Applicants convicted before AEDPA’s effective date had until April 24, 1997 to file a timely petition for writ of habeas corpus. See Miller v. New Jersey State Dep’t of Corrections, 145 F.3d 615, 617-18 (3d Cir. 1998). However, AEDPA states that the time during which a properly filed application for state post conviction or other collateral review is pending shall not be counted toward any period of limitation. 28 U.S.C. §2244(d)(2).

Moreover, the Third Circuit determined that the one (1) year statute of limitations under AEDPA is subject to equitable tolling. See Miller at 618. Equitable tolling is only proper when

the “principles of equity would make rigid application [of a limitations period] unfair.” Id. The Third Circuit further stated that a habeas petitioner “must show that he or she exercised reasonable diligence in investigating and bringing [his] claims.” Id. at 618-19. Equitable tolling of a statute of limitations period is only justified in one of the following situations: (1) if the defendant has actively misled the plaintiff; (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) if the plaintiff has timely asserted his rights, but has mistakenly done so in the wrong forum. Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999).

Neither the Supreme Court nor the Third Circuit has specifically addressed the question of whether there is an exception to the AEDPA statute of limitations based upon actual innocence. However, the Third Circuit recently stated in Horning v. Lavan, 2006 U.S. App. LEXIS 24678, that even assuming that actual innocence was permitted to trigger equitable tolling of the AEDPA statute of limitations, a petitioner’s claim could still fail if the petitioner did not exercise reasonable diligence in pursuing his actual innocence claim.

In the instant case, Petitioner’s direct appeal ended in 1985 and his first PCRA petition concluded in 1994. Because both his direct review and his first collateral appeal took place prior to the enactment of AEDPA, Petitioner had until April 24, 1997 to timely file his habeas corpus petition. Petitioner filed his second habeas corpus petition in May 2006, nine (9) years after the statute of limitations had run. Since petitioner did not timely file his petition for writ of habeas corpus, his petition will be dismissed as untimely unless the statute of limitations period should be tolled.

Petitioner concedes in his Objection the untimeliness of his petition, but argues that the statute of limitations under AEDPA should be equitably tolled for the following reasons: (1) the

filing of his second PCRA petition in 2003, and (2) his claim of actual innocence. Although the AEDPA does permit tolling while there is a collateral review in state court, Petitioner's second PCRA petition was filed in 2003, six (6) years after the deadline for Petitioner to file a timely habeas corpus petition. Therefore, the filing of Petitioner's second PCRA petition, determined to be untimely by the state court under state law, does not toll the statute of limitations under the AEDPA.

Moreover, Petitioner's claim of actual innocence does not toll the statute of limitations under the AEDPA. After filing his first PCRA petition in 1994, the Petitioner waited nine (9) years to file a second PCRA petition in 2003. After the second PCRA petition was dismissed as untimely, Petitioner waited three (3) years to file the instant habeas corpus petition. Petitioner did not give an explanation for the lengthy delay between the time the Pennsylvania Supreme Court denied his petition for allowance of appeal in 1994 and the filing of his second PCRA petition in 2003. There is no evidence that the Petitioner exercised reasonable diligence in pursuing his actual innocence claim. As such, Petitioner's Objections to the Report will be overruled.

An appropriate order follows.

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ORDER

AND NOW, this 17th day of January 2007, upon consideration of the Petition for Writ of Habeas Corpus, and after review of the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi, and Petitioner's Objections thereto, **IT IS HEREBY ORDERED** that:

1. Petitioner's Objections are **OVERRULED**,
2. The Report and Recommendation is **APPROVED** and **ADOPTED**, and
3. Petitioner's Writ of Habeas Corpus is **DENIED**.
4. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

s/ Clifford Scott Green, S.J.

CLIFFORD SCOTT GREEN, S.J.